

In the
Supreme Court of the United States

October Term, 1985

FRANKLIN AND MARSHALL COLLEGE,

Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION,

Respondent.

**BRIEF OF 27 COLLEGES AND UNIVERSITIES
AS AMICI CURIAE IN SUPPORT OF PETITION**

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Juniata College

King's College

Lafayette College

Lancaster Bible College

Medical College of Pa.

Moravian College

Duquesne University of the

Holy Ghost

Muhlenberg College

New York University

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of California

Rutgers, The State

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Supreme Court, U.S.

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CLERK

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Saint Joseph's University
Saint Vincent's College
Santa Clara College
Seton Hall University
Seton Hill College
St. Francis College (Pa.)
Susquehanna University
Texas Christian University
Texas State Technical
Institute

Thiel College
University of Medicine and
Dentistry of New Jersey
University of Michigan
University of Pittsburgh
University of Scranton
Upsala College
Ursinus College
Westminster College
Widener University
York College of Pennsylvania

TABLE OF CONTENTS

	<u>Page</u>
INTEREST OF THE AMICI CURIAE	1
REASONS FOR GRANTING THE PETITION.....	5
I. The Third Circuit Decided An Important First Amendment Issue In A Manner That Was Not Correct And Which Conflicts With Decisions Of This Court And Other Courts of Appeal	8
II. The Third Circuit's Holding That Tenure Materials From Throughout The Institution Must Be Produced In An Individual Case Is A Marked Departure From Prior Precedent Nationwide	12
CONCLUSION.....	18

TABLE OF AUTHORITIES

CASES:

	<u>Page</u>
<i>Allan v. St. Francis College</i> , F.2d (3d Cir. Docket No. 85-3205; March 3, 1986) ...	4-5
<i>Almeida-Sanchez v. United States</i> , 413 U.S. 266 (1973)	10
<i>Banerje v. Board of Trustees, Smith College</i> , 648 F.2d 61 (1st Cir. 1981)	17
<i>Branzburg v. Hayes</i> , 408 U.S. 665 (1972)	9
<i>EEOC v. Associated Dry Goods Corp.</i> , 449 U.S. 590 (1981)	2
<i>EEOC v. Shell Oil Co.</i> , 466 U.S. 54 (1984)	15
<i>EEOC v. University of Notre Dame du Lac</i> , 715 F.2d 331 (7th Cir. 1983)	9, 13, 15
<i>Gray v. Board of Higher Education</i> , 692 F.2d 901 (2d Cir. 1982)	9, 13, 14
<i>Hafermehl v. University of Washington</i> , 29 Wash.App. 366, 628 P.2d 846 (Ct. App. 1981)	13
<i>In Re Dinnan</i> , 661 F.2d 426 (11th Cir. 1981), cert. denied, 457 U.S. 1106 (1982)	15
<i>Jepsen v. Florida Board of Regents</i> , 610 F.2d 1379 (5th Cir. 1980)	14
<i>Keyes v. Lenoir Rhyne College</i> , 552 F.2d 579 (4th Cir.), cert. denied, 434 U.S. 904 (1977)	14
<i>Keyishian v. Board of Regents</i> , 385 U.S. 589 (1967)	9
<i>King v. University of California</i> , 138 Cal.App.3d 812, 189 Cal.Rptr. 189 (1982)	13

	<u>Page</u>
<i>Konigsberg v. State Bar</i> , 366 U.S. 36 (1961)	9
<i>Laborde v. University of California</i> , 686 F.2d 715 (9th Cir. 1982)	13
<i>Lowe v. Securities & Exchange Comm'n</i> , U.S., 105 S.Ct. 2557, 86 L.Ed.2d 130 (1985)	11
<i>Lynn v. University of California</i> , 656 F.2d 1337 (9th Cir. 1981)	13
<i>McKillop v. University of California</i> , 386 F.Supp. 1270 (N.D. Cal. 1975)	13
<i>NLRB v. Catholic Bishop of Chicago</i> , 440 U.S. 490 (1979)	11
<i>Paul v. Stanford University</i> , F.Supp., 39 CCH EPD ¶35,918 at 41,370 (N.D. Cal. 1986)	5
<i>Rollins v. Ferris</i> , F.Supp., 39 BNA FEP Cases 1102, 1104-05 (E.D. Ark. 1985)	5
<i>Shelton v. Tucker</i> , 364 U.S. 479 (1960)	9
<i>Stanford University v. Superior Court</i> , 119 Cal.App.3d 516, 174 Cal.Rptr. 160 (1981) ...	13
<i>Sweezy v. New Hampshire</i> , 354 U.S. 234 (1957)	8-9
<i>Time, Inc. v. Regan</i> , 468 U.S., 82 L.Ed.2d 487, 104 S.Ct. 3262 (1984)	11
<i>Zaustinsky v. University of California</i> , 96 F.R.D. 622 (N.D. Cal. 1983)	13

Page

MISCELLANEOUS:

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**In the
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October Term, 1985

FRANKLIN AND MARSHALL
COLLEGE,

Petitioner,

No. 85-1439

v.

EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION,

Respondent.

⁶⁷
BRIEF OF ~~66~~ COLLEGES AND UNIVERSITIES AS
AMICI CURIAE IN SUPPORT OF THE PETITION

INTEREST OF THE AMICI CURIAE

Amici Curiae respectfully submit the within brief in support of the petition for a writ of certiorari, the written consent of each party having been obtained and filed with the clerk of this Court.

⁶⁷

Amici curiae are an ad hoc group of ~~66~~ colleges and universities representing a broad cross-section of American post-secondary educational institutions. Although this group includes institutions of varying sizes, types, and locations, each amicus is concerned because, as the Court of Appeals for the Third Circuit admitted, its decision will be the "demise" of the confidentiality of the peer review tenure selection process which has served our nation's educational institutions well throughout their history. In this case, the Third Circuit ordered that previously confidential peer-group tenure evaluation materials from throughout the institution must be made available to the EEOC in

connection with a charge that a single instructor had been discriminated against due to his French national origin.¹

The Third Circuit's 2-1 panel decision holding that the confidentiality of faculty tenure decisions is to be swept away—while refusing to balance this historic First Amendment freedom against a federal agency's request for information only loosely related to the change before it—arose at a small, private institution in Pennsylvania. Although that small college, Franklin & Marshall, has only approximately 134 faculty members and 1,900 students, the decision is making a large impact at other institutions throughout the country.

Many of the amici curiae are institutions similar in size to Franklin & Marshall. They wish to join in urging this Court to review this case because, due to their size, they could not afford to litigate alone against a governmental agency intent, even inadvertently, upon destroying the collegial nature of their institutions. These amici, similar in size to Franklin and Marshall, include Upsala College, Saint Joseph's University, King's College, Juniata College, Moravian College, Ursinus College, Lafayette College, Beaver College, Westminster College, and Muhlenberg College.

The Third Circuit's decision, however, is of equal, if not greater, concern to large institutions with many thousands of students and literally hundreds of faculty members. These amici include Rutgers, The State University of New Jersey, Pennsylvania State University, the

¹The EEOC would then be free to give the confidential materials relating to faculty members throughout the institution to the instructor who protested his denial of tenure, *EEOC v. Associated Dry Goods Corp.*, 449 U.S. 590 (1981), and the confidentiality of the institution's entire tenure system would be destroyed.

University of Pittsburgh, Fairleigh Dickinson University, Widener University, and the fourteen institutions which comprise the Pennsylvania State System of Higher Education.

To these large institutions, it is apparent that the Third Circuit's ruling compelling the disclosure of all confidential tenure materials from throughout the institution for a multiple year period upon the request of a single disgruntled instructor will destroy quickly the confidentiality necessary to the operation of the tenure process. Moreover, it will create a paperwork nightmare and require hundreds of hours of response time even when the requested materials are not likely to be related to a particular tenure decision, each of which is unique.

Other amici have joined in this brief to urge this Court to review the Third Circuit's decision because the decision has raised concerns outside the confines of the Third Circuit. This decision, which conflicts with prior decisions by the Second and Seventh Circuits and which represents a major departure from related decisions by or within the Fourth, Fifth, and Ninth Circuits as well, is of nationwide importance and merits review by this Court for that reason.

Amici from outside the Third Circuit which have joined in this request that this Court review the Third Circuit's decision include the University of Arizona, Arizona State University, Northern Arizona University, New York University, the University of Michigan, Illinois State University, Northern Illinois University, Sangamon State University, Santa Clara College (California), the Texas State Technical Institute, and the nine institutions which comprise the University of California.